Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

LARRY R. ANDERSON,

Petitioner,

vs.

STATE OF DELAWARE,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

PETITION FOR A WRIT OF CERTIORARI

LARRY R. ANDERSON
Petitioner, Pro Se
200 K Street, NW
Suite 718
Washington, DC 20001
(202) 371-9127

9339
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

38 pp

QUESTION PRESENTED

Whether an intoxilyzer's results can be admitted into evidence when the calibration certification testing time frame standard is not defined and where:

(a) There is no statutory provision which addresses the time frame within which certification must be made;

(b) The state and the defense at trial agreed on the standard which controlled admissibility of the evidence;

(c) The trial court applied its own standard for admissibility in contravention of the agreed upon standard between the state and the defense contravening due process.

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Petitioner Larry R. Anderson respectfully prays that a writ of certiorari be issued to review the *per curiam* opinion of the Supreme Court of the State of Delaware issued in the above proceeding May 10, 1996.

OPINIONS BELOW

The opinion of the Supreme Court of which this review is sought (App. B, p. 3a) held that the petitioner's appeal to the Supreme Court from a memorandum opinion issued by the Superior Court for the State of Delaware in and for Sussex County (App. C, p. 8a) was affirmed. This opinion was dated November 20, 1995 and was on an appeal for a conviction for DUI in the Court of Common Pleas for the State of Delaware in and for Sussex County dated April 17, 1995 (App. D, p. 19a).

STATEMENT OF JURISDICTION

The opinion of the Supreme Court of the State of Delaware was entered on May 10, 1996. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). Jurisdiction for the Supreme Court of the State of Delaware and for the Supreme Court for the State of Delaware in and for Sussex County was invoked under 11 Del. C. § 5301(e).

STATUTORY PROVISION INVOLVED

This case involves the lack of a standard and vagueness of 21 Del. C. § 4177 in articulating a time frame frequency for the testing and calibration of an intoxilyzer and, thus, its subsequent admissibility as evidence.

STATEMENT OF THE CASE

A writ of certiorari is requested in the case to allow this Court to review the State Supreme Court of Delaware's opinion entered May 10, 1996 (App. B, p. 3a) which upheld the decision of the Superior Court of the State of Delaware in and for Sussex County (App. C., 8a) regarding the suppression of the admission of the results of an intoxilyzer. The grounds for suppression were that the calibration of the intoxilyzer by the State Chemist was not timely. A brief summary of the background facts and the proceedings follows.

On Saturday, November 26, 1994, Larry R. Anderson was arrested by Pfc. Paul Parsons of the Rehoboth Beach, DE Police Department for Driving Under the Influence of Alcohol ("DUI") in violation of 21 Del.C. § 4177(a).

Anderson was found guilty of DUI at trial before the Honorable Merrill C. Trader in the Court of Common Pleas of the State of Delaware in and for Sussex County on April 17, 1995 (App. D, p.19a).

At trial, defense counsel raised certain suppression issues. The suppression issue at discussion in this summary is whether or not the intoxilyzer test results could be properly received into evidence. Judge Trader ruled against the defense and admitted the intoxilyzer results.

On or about November 26, 1994 at 2332 hours, Officer Paul William Parsons of the Rehoboth Beach, DE Police Department, who was in uniform and in a marked police car, observed the petitioner traveling northbound on Bayard Avenue from Dewey Beach, DE at what appeared to be an excessive rate of speed. The officer made an u-turn and paced the speed of the petitioner. While in pursuit, petitioner made a right turn without signaling,

at which time the police officer pulled behind him and put on his lights. The vehicle stopped immediately.

The officer asked the petitioner to perform certain roadside coordination tests. When Anderson's field sobriety tests were completed, Parsons took him to the Rehoboth Beach Police Department for testing on the intoxilyzer machine. After arresting him for driving under the influence, Parsons, who is a certified intoxilyzer officer, observed Anderson for twenty minutes prior to administering the intoxilyzer test.

Anderson performed the intoxilyzer test at 12:20 a.m. on November 27, 1994, within four hours of the stop. Anderson's blood alcohol content level according to the intoxilyzer was 0.14 percent.

The calibration of the Rehoboth Beach Police Department intoxilyzer had been checked and certified as accurate by Carol Wilkinson, an employee of the State Chemist's office, on November 14, 1994. In addition, the calibration of the intoxilyzer used for testing Anderson on November 27 was rechecked and found to be accurate on December 15, 1994.

Defense argued that the arrest occurred November 26, 1994 at nearly midnight and that the intoxilyzer was given on the early morning hours of November 27, 1994. The intoxilyzer record log showed that the intoxilyzer was tested on November 14, 1994 and not again until December 15, 1994. Defense counsel argued that this was more than 30 days and violated the bench ruling of Judge Steele in *State v. Peck* Del. Super., Cr. A No. 93-07-0290A, Steele J. (Sept. 1, 1993). The trial judge ultimately ruled that he felt if the test of the intoxilyzer was given 30 days before and/or 30 days after the arrest that it was sufficient, which was contrary to the *Peck* decision (App. E, p. 22a-24a).

The State at trial agreed that the standard in *Peck* was 30 days and agreed that the time frame of 31 days was outside the scope of what was required in *Peck,* but should be considered *de minimus*. (App. E, p. 25a).

After conviction, Anderson filed a notice of appeal to the Superior Court for the State of Delaware in and for Sussex County on the grounds that there was insufficient evidence to convict and improper admission of evidence. The Superior Court ruled that there was enough evidence to support the decision of the Court of Common Pleas on the issue of probable cause. (App. C, p. 13a). The next issue of the admissibility of the intoxilyzer results was upheld by the Superior Court. However, in its Memorandum Opinion, the Superior Court found that there was "no statutory law or written decision which addresses the issue of the time frame within which the certifications must be made". (App. C, p. 14a). It also agreed that the State and defense agreed that the decision in *Peck* controlled the standard for admittance (App. E, p. 25a) and that adopted by the Court of Common Pleas in admitting the evidence was in error. (App. C, p. 17a).

The petitioner then filed an appeal of this decision with the Supreme Court of the State of Delaware. The basis for appeal was the inadmissibility of the intoxilyzer results due to the testing being more than 30 days apart. The Supreme Court held there was not bright line rule for the testing of the intoxilyzer or for this testing to be done either monthly or every 30 days. (App. B, p. 6a). It held that in absence of a statute, that a trial court may consider the admissibility of the evidence by determining a reasonableness threshold for the frequency of calibration. This analysis must be done on a case-by-case basis. (App. B, p. 6a). Based on the preceding discussion, the Supreme Court upheld Anderson's conviction.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of the State of Delaware is based on a statutory provision which is vague and in conflict with prior decisions of this Court which hold that, if due process is to be served, standards must be included in statutes which provide for due process safeguards. Both the State and defense agreed at trial what the standard was for submitting the intoxilyzer and the trial judge invoked his own standard.

I.

THE SUPREME COURT OF THE STATE OF DELAWARE IN ITS OPINION RELIED ON A STATUTORY PROVISION WHICH DENIES DUE PROCESS BY HAVING NO TIME FRAME STANDARD STATED FOR THE TESTING CERTIFICATION OF AN INTOXILYZER.

The decision of the Supreme Court of the State of Delaware in this case is in direct conflict with prior decisions of this Court governing the articulation in a statute of standards to provide the safeguards of due process.

The Supreme Court of the State of Delaware in its opinion in this case raised the issue of the lack of a bright line standard in 21 Del. C. 4177 for the testing of an intoxilyzer. (App. B, p. 4a). The petitioner, at trial, raised the issue of a thirty day time frame between calibration testing of an intoxilyzer as the standard for its admittance into evidence. (App. E, p. 22a-24a). Since there is no express standard defined, unlike some other jurisdictions, in 4177, it is through case law that the time frame standard for testing an intoxilyzer has been established and therefore, the admissibility of an intoxilyzer results as evidence. The most recent authority on this subject is *State v. Peck*, Del Super., Cr. A.

93-07-0290A, Steele, J. (Sept. 1, 1993). The pertinent part of the case in this regard is discussed in the Superior Court opinion. (App. C, p. 15a-17a). Objection to the admission of the intoxilyzer's result was overruled by the trial court which then articulated its own standard. (App. E, p. 24a). Throughout the appeal process the petitioner, in his briefs, has consistently raised the question of a proper standard for the calibration and testing time frame for an intoxilyzer and, therefore, its admissibility as evidence.

In *Smith, Sheriff v. Goguen*, 415 U.S. 566 (1974), this Court has held that:

> Without doubt the "substance" of this claim was fairly presented to the state courts under the exhaustion standards of Picard, Supra at 275, 278.

Goguen, at 577 citing *Picard v. Conner*, 404 U.S. 270 (1971).

Further in *Goguen*, this Court discussed "the absence of any ascertainable standard requirement".

> This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause. The deficiency is particularly objectionable in view of the unfettered latitude accorded law enforcement officials and triers of fact. Until it is corrected either by amendment or judicial construction, it affects all who are prosecuted under the statutory language.

Smith, Sheriff v. Goguen, 415 U.S. 566 at 578 (1974).

The Supreme Court of the State of Delaware in its opinion held that no bright line exists requiring calibration in 21 Del.C. 4177 and, such a rule would have to come from the General Assembly. (App. B, p. 6a). This in contravention of past decisions of this Court in dealing with due process and the requirement that States set guidelines.

> It is a basic principle of due process that an enacement is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policeman, judges, and juries for resolution on an ad hoc basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockfield, 408 U.S. 104 at 108-109 (1972):

> Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement.

Goguen, at 572-573 citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

The Court of Common Pleas used its own standard for the time frame for the calibration and testing of the intoxilyzer and the admittance of the results as evidence (App. E, p. 22a-24a) and there was deemed no rationale for the standard that the trial court employed as held by the opinion of the Superior Court. (App. C, p. 17a). By determining that the standard for admittance of an intoxilyzer be on a case-by-case basis, the Supreme Court of the State of Delaware has opened up each case to the selective and arbitrary determination of what is the standard for testing and admissibility of the results. This contravenes the concept embodied in the due process clause against vagueness and the need for explicit standards.

CONCLUSION

The Supreme Court of the State of Delaware affirmed the petitioner's conviction based upon a statute which contains no standards for the testing of an intoxilyzer. The petitioner's right to due process was hindered by the vagueness of the statute which the Supreme Court employed, 21 Del. C. § 4177 which contains no provisions on the frequency of calibration of an intoxilyzer as do other jurisdictions. The Supreme Court ruled that admissibility was to be on some vague temporal proximity of the calibration being too remote as to be reasonable and on a case-by-case basis (App. B, p. 6a). In this petitioner's case, the state and defense agreed on the calibration time frame standard, but the trial court employed his own standard. Without a bright line rule as to the precise standard for testing and calibration and, therefore admissibility, the petitioner was deprived of due process when the agreed upon standard of for the testing time frame and admissibility was contravened by the trial court. The writ of certiorari should be granted.

Respectfully submitted,

LARRY R. ANDERSON
Petitioner, Pro Se
200 K Street, NW
Suite 718
Washington, DC 20001
(202) 371-9127

APPENDIX A — MANDATE OF THE SUPREME COURT OF THE STATE OF DELAWARE FILED MAY 29, 1996

MANDATE

THE SUPREME COURT OF THE STATE OF DELAWARE

To: Superior Court of the State of Delaware in and for Sussex County

GREETINGS

WHEREAS, in the case of:

Cr. A. No. 95-02-0800 and 0801

STATE OF DELAWARE

V.

LARRY R. ANDERSON

a certain judgment or order was entered on the 20th day of November, 1995, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the judgment or order was duly appealed to this Court, and after consideration has been finally determined, as appears from the opinion or order of this Court filed on May 10, 1996, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the order or judgment be and it is hereby affirmed.

Appendix A

SIGNED, SEALED AND ATTESTED BY:

Cathy L. Howard,
Clerk of the Supreme Court

Issued: May 29, 1996
Supreme Court No. 504, 1995

APPENDIX B — OPINION OF THE SUPREME COURT OF THE STATE OF DELAWARE FILED MAY 10, 1996

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NO. 504, 1995

Court below: Superior Court of the State of Delaware in and for Sussex County

Cr. A. Nos. 95-02-0800 and 0801

LARRY A. ANDERSON,

Defendant-below Appellant.

v.

STATE OF DELAWARE

Plaintiff-below Appellee.

Submitted: April 23, 1996
Decided; May 10, 1996

Before VEASEY, Chief Justice, WALSH and HARNETT, Justices.

Upon appeal from Superior Court. AFFIRMED.

John M. Willard, Esquire, Wilmington, for Appellant.

John Williams, Esquire, Deputy Attorney General, Department of Justice, Dover, for Appellee.

Per Curiam:

Appendix B

In this appeal, we are asked to determine whether the failure of the State Chemist to calibrate within a thirty-day period an intoxilyzer device used to test the blood alcohol concentration of persons suspected of driving under the influence of alcohol renders inadmissible at trial the evidence obtained by that device. Defendant below-appellant, Larry R. Anderson ("Anderson"), contends that the Superior Court erred by admitting the results of Anderson's intoxilyzer test into evidence where the device had not been calibrated for a period of thirty days.

In affirming the conviction, we hold that there is no bright-line rule requiring the State to show calibration of an intoxilyzer device every thirty days as a predicate to admitting the results of the intoxilyzer test into evidence. Rather, we hold that the calibration must be conducted within a reasonable temporal proximity in order to admissible, and the extent of the temporal proximity or remoteness would normally go only to the weight to be ascribed to this evidence, not its admissibility. Accordingly, we AFFIRM Anderson's conviction for Driving Under the Influence in contravention of 21 Del. C. §4177(a), but on different grounds from that on which the Superior Court predicated its decision.

1. Facts

On November 26, 1994, at approximately 11:30 p.m., Anderson was stopped by Officer Paul William Parsons of the Rehoboth Beach Police Department in connection with a routine traffic infraction. Upon encountering Anderson, Officer Parsons detected an odor of alcohol, observed that Anderson's speech was slurred, and also observed that he appeared confused. Officer Parsons administered field sobriety tests and concluded

that Anderson had been operating his vehicle under the influence of alcohol. Accordingly, Anderson was taken into custody and an intoxilyzer device was used to determine Anderson's blood alcohol level. The intoxilyzer revealed that Anderson's blood alcohol concentration was .14 percent, .04 percent above the level allowed by section 4177.

II. Disposition in the Court of Common Pleas and the Superior Court

Anderson was charged with Driving Under the Influence, and his case proceeded to a bench trial in the Court of Common Pleas. At trial, the State sought to introduce the intoxilyzer results into evidence as part of its case-in-chief. To this end, the State demonstrated that the intoxilyzer had been tested and certified as working properly on November 14, 1994, thirteen days before Anderson's arrest and testing. The State also showed that the intoxilyzer was again tested and certified as working properly on December 14, 1994, eighteen days after Anderson's test.

Anderson objected to this evidence on the ground that the two calibrations of the intoxilyzer device had not occurred within a thirty-day period. To support his assertion that the test results were inadmissible, Anderson relied on a Superior Court bench ruling issued in the case of *State v. Peck*, Del Super. Cr. A. No. 93-070290A (Sept. 1, 1993). Anderson's contention was that *Peck* required calibrations within thirty days in order for the evidence to be admissible. The contention was rejected by the Court of Common Pleas which held that the intoxilyzer need not be calibrated every thirty days, but must be calibrated within reasonable temporal proximity of the defendant's test. The Superior Court, sitting as an intermediate appellate court,

affirmed Anderson's conviction but disapproved of the Court of Common Pleas' holding that calibration of the intoxilyzer within a reasonable time of the defendant's test was sufficient.

III. Calibration of the Intoxilyzer Device

The Superior Court held that calibration must occur monthly and that this condition was met in the case at bar. We affirm Anderson's conviction, but hold that no bright-line rule exists requiring calibration either monthly or every thirty days. If there is to be a bright-line rule requiring monthly testing of the intoxilyzer for admissibility purposes, that rule must, of necessary, come from the General Assembly. Section 4177 makes no mention of the frequency of calibration required for the intoxilyzer results to be admissible.

Failure to test the device for an unreasonably extended period of time would render the evidence unduly prejudicial as compared to its probative value. Under these circumstances, Delaware Rule of Evidence 403 would allow the trial court to bar its introduction. This analysis must be on a case-by-case basis. In the absence of a statute prescribing precise rules of admissibility, the trial court may consider the frequency of calibration as a factor bearing on admissibility only if the offer of proof is found to be unreliable because the temporal proximity of the calibration is too remote to be reasonable under the circumstances of the case. If this reasonableness threshold for admissibility is met, the extent of the temporal proximity or lack of goes only to the weight to be ascribed by the trier of fact to evidence gathered from the intoxilyzer device.

Prior case law of this Court is in accord with this result. As we held in *McConnell v. State*, Del. Supr. No. 293, 1993,

Appendix B

Holland, J. At 3 (Feb.. 3, 1994) (ORDER), "[i]t is well-established in Delaware that the prerequisite to introducing the result of an intoxilyzer test into evidence is to present the certifications of the State Chemist that the intoxilyzer machine was operating accurately before and after testing the breath of the defendant on trial" (citing *Best v State*, Del Supr., 328 A2d 181 (1974). We have found no precedent of this Court purporting to state a bright-line rule. Moreover, we do not construe *Peck* as establishing such a rule for all cases. The ruling in *Peck* was case-specific, but may have been read subsequently as standing for a broader principle. To the extent that *Peck* may be construed to be at odds with the decision we now reach, it is overruled.

IV. Conclusion

Based on the preceding discussion, we AFFIRM Anderson's conviction for Driving Under the Influence in contravention of 21 Del. C. §4177(a).

APPENDIX C — OPINION OF THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY FILED NOVEMBER 20, 1995

IN THE SUPERIOR COURT OF THE STATE
OF DELAWARE IN AND FOR SUSSEX COUNTY

CRIMINAL ACTION NO. 95-02-0800 AND 95-02-0801

LARRY A. ANDERSON,

Defendant-below Appellant.

v.

STATE OF DELAWARE

Plaintiff-below Appellee.

MEMORANDUM OPINION

Date Submitted: September 20, 1995
Date of Decision: November 20, 1995

John M. Willard, Esquire, 104 E. 14th Street, Wilmington, Delaware, 19801, attorney for the defendant-below, Appellant.

A. Dean Betts, Jr., Esquire, Department of Justice, Georgetown, Delaware, 19947, attorney for the plaintiff-below, Appellee.

GRAVES, Judge

This appeal arises from appellant Larry R. Anderson's conviction after a bench trial in the Court of Common Pleas on a charge of driving under the influence of alcohol in violation of 21

Appendix C

Del. C. § 4177(a). Appellant cites as grounds for his appeal errors by the trial court in a pretrial ruling and in a trial ruling. This is my decision on appeal.

FACTS

Officer Paul William Parsons, of the Rehoboth Beach Police Department, arrested appellant for driving under the influence in November, 1994. The arrest occurred after the officer stopped appellant in Rehoboth Beach, Delaware for a traffic violation, observed him, and had him perform field tests. Subsequent to his arrest, the police officer administered a breath test, which appellant failed.

Before the trial in this matter began, appellant moved to suppress evidence on the ground that the officer lacked probable cause to arrest him for driving under the influence. The officer's testimony regarding probable cause is summarized below.

At approximately 11:30 p.m. on November 26, 1994, while on routine patrol, the officer saw appellant's vehicle speeding as it entered the city limits. The officer turned and began following appellant's vehicle. The vehicle traveled about two blocks, made a sharp right turn onto Hickman Street, and failed to signal at the turn. Upon being stopped, appellant jumped out of his vehicle and began to walk away at a rapid pace. The officer called to appellant and told him to come to him so he could talk with him. The officer noticed that appellant appeared "kind of confused;" his speech was slurred; and a faint to moderate odor of alcohol emanated from him.

The officer then had appellant perform some field test. Although appellant made what he contends were minor mistakes

on the field tests, the officer considered the test results failures because the mistakes stemmed from appellant's failure to follow directions. On the alphabet listing test, appellant said the alphabet from A to Q after he was instructed to say it from E to P. Appellant counted backwards from 100 to 98, but he did it very slowly. On the finger to nose test, appellant was able to touch his nose with his index fingers but he missed when instructed to touch his nose with his little fingers. Appellant made several mistakes on the heel to toe test. On the one-legged stand test, where appellant was supposed to stand on his leg for thirty (30) seconds, appellant hopped after ten (10) seconds and put his foot down after eleven (11) seconds and then again after fifteen (15) seconds.

Also of note is that appellant told the officer he lived on Hickman Street, but he did not know that he was on Hickman Street. Finally, as appellant attempted to tie his shoe, he fumbled and fell back onto his car.

The Court made the following findings regarding probable cause:

> It is true that the coordination test [sic] appear to produce mixed results. But as the court evaluates his performance, I'm satisfied that he failed at least three out of five. That would be the walking and turning, the balance and the finger to nose. And there is another indication he's under the influence including the odor of alcohol on his breath, his apparent confusion when he was stopped. It looked like he was making an attempt to flee as well as some erratic driving.

Appendix C

> . . . [T]he conduct, looking at it as a whole, is probable cause for the police officer to take the defendant into custody and requiring him to submit to breath tests.

The evidence submitted with regard to the probable cause issue was entered into evidence in support of the state's case in chief. The State then sought to introduce the results of the intoxilizer. The evidence shows that the machine involved was an Intoxilizer 5000. Defendant sought to bar the introduction of this evidence on the ground that the Delaware State Police Chemist's testing of the machine and her certifications that it was working properly were not timely made. Appellant's second ground of appeal stems from the admission of the intoxilizer results over appellant's objection thereto. Accordingly, the evidence and argument on this issue is summarized below.

Appellant's intoxilizer test took place on November 27, 1994. The results thereof showed appellant had a blood alcohol level of .14 percent. The evidence further showed that the machine had been tested, and certified as working properly, on November 14,1 995 and then again on December 15, 1995.

Appellant moved to suppress the admission of the results on the ground that because the testing dates by the Delaware State Police Chemist did not occur within thirty (30) days of each other, case law prohibited the introduction thereof. The authority to which appellant cited is the bench ruling of Judge Steele in the case of *State v. Peck*, Del Super., Cr. Action No. K 93-07-0290A, Steele, J. (September 1, 1993) ("*Peck*"). The Court of Common Pleas rejected appellant's position, stating that the chemist's test and certification must be performed within a reasonable time from the date of the test at issue, and thirty (30) days before and

thirty (30) days after the test at issue is reasonable. Based on that rationale, the Court concluded that the chemist's tests and certifications were timely as they both were within thirty (30) days of appellant's test.

After all the evidence was submitted, the Court of Common Pleas found that appellant's guilt was established beyond a reasonable doubt. On this appeal, appellant attacks the rulings on probable cause and the admissibility of the intoxilizer results.

DISCUSSION

Appellant brings this appeal on the record pursuant to 11 *Del. C.* §5301(c). When sitting as an intermediate court of appeals, this Court functions the same as the Supreme Court. *Baker v. Connell,* Del. Supr., 488 A.2d 1303, 1309 (1985); *Shipkowski v. State,* Del. Super. No. K88-03-033A, Steele, J. (July 28, 1989) at 3. Accordingly, the court reviews to see if alleged errors of law occurred and whether the evidence supports the factual findings viewed in a light most favorable to the State. *Shipkowski v. State, supra.*

The first issue concerns probable cause. The standard for determining probable cause appears in *State v. Maxwell,* Del. Supr., 624 A.2d 926, 929-30 (1993);

> [A] police officer has probable cause to believe a defendant has violated 21 *Del. C.* § 4177..."when the officer possesses information which would warrant a reasonable man in believing that [such] a crime has been committed." *Clendaniel v. Voshell,* De. Supr., 562 A.2d 1167, 1170

> (1989). . . . A finding of probable cause does not require the police to uncover information sufficient to prove a suspect's guilt beyond a reasonable doubt or even to prove that guilt is more likely than not. [Citation omitted.]. . . . The possibility that there may be a hypothetically innocent explanation for each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest. [Citation omitted.]
>
> . . . "Probable cause exists where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information *[are] sufficient in themselves* to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." [Citation omitted.] [Emphasis in original.]

In this case, defendant's erratic driving, his attempt to flee, his confused state, his slurring, the odor of alcohol emanating from him, and his coordination difficulties evidenced on the field tests were sufficient to establish probable cause. *See Camacho v. Shahan,* Del. Super., C.A. No. 91A-09-003, Ridgley, P.J. (September 19, 1994) (Speeding, odor of alcohol, bloodshot eyes, and unsuccessful completion on parts of field tests constituted probable cause). Accordingly, the Court affirms the decision of the Court of Common Pleas on the issue of probable cause.

The next issue pertains to the admissibility of the intoxilizer

results. The Delaware Supreme Court has stated the following concerning the introduction of intoxilizer results:

> It is well-established in Delaware that the prerequisite to introducing the result of an intoxilyzer test into evidence is to present the certifications of the State Chemist that the intoxilyzer machine was operating accurately before and after testing the breath of the defendant on trial. *Best v. State*, Del Supr., 328 A.2d 141 (1974).

McConnell v. State, Del. Supr., C.A. No. 293, 1993, Holland, J. (February 3, 1994) (Order) at 3. Here, the certifications that the machine was operating accurately before and after appellant's test were introduced. However, the certifications of the Delaware State Police Chemist occurred thirty-one (31) days apart. There is no statutory law or written decision which addresses the issue of the time frame within which the certifications must be made. However, the bench ruling in *Peck* does address the issue.

Before reviewing the *Peck* decision, it is necessary to review two decisions on which the Superior Court bases its decision in *Peck*. The first decision I examine is *State v Malloy*, Del Super., Cr. Action No. N87-111-0302, Bifferato, J. (April 22, 1988). In that case, the Court determined that the Intoxilizer 5000 adequately measures the breath alcohol content of a defendant. The Court noted, at page 2, that "[t]hese intoxilizers are testing *monthly* with a known sample and any variation in the test results can be ascertained from the variations in the test of the known sample." (Emphasis added.)

Appendix C

In the case of *State v Johnson,* Del. Ct. Com. Pleas, Cr. Action No. 83-05-0223T, Ellis, J. (December 12, 1983) at 5-6, the Court of Common Pleas set forth the procedures employed in the testing of the intoxilizer:

> The Omicron Intoxilizer has been recognized as a reliable device to test blood alcohol content. [Citations omitted.] Subsequently, the CMI Intoxilizer, the intoxilizer used in this case, was held to be "a reasonably accurate and reliable device for the measurement of blood alcohol concentration by breath sample, provided the manufacturer's instructions are followed and the operator is qualified." [Citation omitted.] . . . In the guide prepared by the State Police to assist the arresting officer in testifying which was introduced as Defendant's Exhibit 2, there is the following: "*Approximately once a month* the State Chemist in the regular course of his business, calibrates and checks the Omicron at each location to see if it is working properly and accurately." [Emphasis added.]

With those decisions outlined, I now turn to the authority on point — the bench ruling of Judge Steele in *State v. Peck,* Del. Super., Cr. Action No. K93-07-0290A, Steele, J. (September 1, 1993). Therein, the Court ruled in pertinent part:

> The issues involving the intoxilizer in my view are more important. The reason I say that is we ask a lot of the intoxilizer when we

ask the Intoxilizer 5000, in essence, to substitute a machine's judgment for human judgment about a uniquely human condition; namely, impairment by alcohol.

It is in my view only fair and appropriate that the State establish according to its self-imposed rules that the machine accurately reflect the truth; namely, the physical condition of the individual at the time the test is taken. . . .

In my view, the result here is tainted by the failure of the State to establish that it has tested this particular Intoxilizer 5000 on a monthly basis. . . .

When Judge Bifferato discussed the Intoxilizer 5000 in State v. Malloy, one of the predicates that forms an assumption that causes him to believe that the Intoxilizer 5000 adequately measure the breath alcohol content of an individual is the fact, as he recites it, these intoxilizers are tested monthly with a known sample and any variation in the test results can be ascertained from the variations in the test of the known sample.

. . . Judge Ellis . . . points in his opinion...that in the guide prepared by the Delaware State Police to assist once a month the state chemist in the regular course of his business

> calibrates and checks the Omicron at each location to see if it is working properly and accurately.
>
> . . . Mr. Sockrider [the State Chemist] candidly admitted that he is the one who suggested many years ago that an appropriate standard in this state is to test these machines once a month.
>
> No evidence beyond mere speculation exists to justify a conclusion any greater parameter of testing, such as merely before and after without regard to time, justifies absolute reliance on a machine's accuracy. No competent evidence exists in this record that anything other than monthly testing justified Judge Bifferato's sound reliance on the assumption that monthly testing would occur in order to place reliance on the Intoxilizer 5000; therefore, I find that the test result in this particular case is tainted by the State's failure to conform to its own self-imposed standard and the motion to suppress is granted.

In this case, the State and defense agreed that the decision in *Peck* controlled the standard for testing the intoxilizer. The Court of Common Pleas, however, determined that testing and certification which occurred within thirty days of the test given at the time of arrest was sufficient. There is no rationale for the standard which the Court of Common Pleas adopted, and accordingly, it committed error in employing the standard it

employed. The proper standard which the State and the courts employ is that set forth in *Peck*, testing the machine on a monthly basis.

The fact that the Court of Common Pleas employed the wrong standard is not fatal because the results are admissible when the correct standard is used. The State does not impose a standard that the testing must occur within thirty (30) days. Judge Ellis noted in *State v. Johnson, supra*, that the guidelines for testing indicate it should be done approximately once a month. The case law does not say the testing must take place within thirty (30) days. It says it must take place monthly.

The time period involved here is thirty-one (31) days. There are months that are thirty-one days long, same as there is a twenty-eight day month. In any case, the testing here was done in approximately a month. Thus, I conclude the testing here occurred in a timely manner. Accordingly, the State met its self-imposed burden on the testing and certification of the machine. The results were admissible, and this Court affirms the Court of Common Pleas decision on the admissibility of the results although it does reach this conclusion by a different rationale.

Based on the foregoing, the decision of the Court of Common Pleas is affirmed.

IT IS SO ORDERED.

APPENDIX D — ORDER OF THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY FILED APRIL 17, 1995

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

CASE NO. *95-02-0800T*

THE STATE OF DELAWARE

VS

LARRY R. ANDERSON

SENTENCED ON *April 17*, 1995 for the following:

CHARGE	TERM
DUI	Commit at Level V for a term of sixty (60) days. To report Morris Correctional Institution, 300 Water St., Dover, DE by 10:00 a.m. on Thursday, May 4, 1995.

COMMENCING ON _____, 19__

FINES	$ 575.00
VCF	103.50 plus 15% surcharge
COSTS	$ 40.00
JUDGE	Merrill C. Trader
DATE	April 17, 1995

Appendix D

ATTEST _____

ASSISTANT CLERK OF THE COURT OF COMMON PLEAS

APPENDIX E — EXCERPTS OF THE TRIAL TRANSCRIPTS DATED APRIL 17, 1995

[37] JUDGE TRADER: All right. That's not the entire record?

MR. WILLARD: Oh no, Your honor. That's what I'm saying. The next part's going to be the intoxilizer. They're going to try to introduce an intoxilizer —

JUDGE TRADER: And the test wasn't made within 30 days before —

MR. WILLARD: Right.

JUDGE TRADER: — or 30 days after?

MR. WILLARD: Right.

JUDGE TRADER: Then you can't get it into evidence.

MR. BETTS: Does Your Honor not wish to hear any argument in regard to that?

JUDGE TRADER: Well, do you have case law?

MR. BETTS: No, we don't Your Honor. We have a one day discrepancy, the 14th of November and 15th of December. We would argue that that would be de minimus violation of the standard operating procedures and it should not affect the admissibility of the intoxilizer tests during both [38] before and after the certain machine was certified as working properly. We would ask Your Honor —

JUDGE TRADER: When was the date of the offense?

MR. WILLARD: The 27th, Your Honor.

JUDGE TRADER: The 27th of what?

MR. WILLARD: November.

JUDGE TRADER: Okay. And what is the date of the first test?

MR. WILLARD: November 14th, Your Honor.

JUDGE TRADER: Okay.

MR. WILLARD: The next test was December 15th.

JUDGE TRADER: Well, that's within 30 days of the date of the offense.

MR. WILLARD: No, it's not, Your Honor. If you count the 14th to the 15th, Your Honor, it's actually 32 days counting both days, but it's certainly more than 30 either way anyway you calculate it.

JUDGE TRADER: Well, I thought it would be 30 days before and after the date of the offense.

[39] MR. WILLARD: Your Honor, that's not the Peck decision. The Peck decision says there must be tests within one month, 30 days of each other, and this is not.

JUDGE TRADER: I'm not certain of that. It seems to me —I feel that the test has to be given within 30 days of the date of

the test, 30 days afterwards. I think that's a reasonable period of time.

[40] MR. WILLARD: Your Honor, that's clearly not the Peck decision, but I've had too many cases involving the Peck decision, Your Honor. The Peck decision says the test must be given within every 30 days. If it's more than 30 days between tests, the test is invalid. The second test would have had to be given by December 13th to be valid.

JUDGE TRADER: All right. Well, I've indicated how I'm going to rule. We need to — at this point do you want to complete the evidence in the case or what?

MR. WILLARD: I guess so, Your Honor.

MR. BETTS: Yes, Your Honor.

JUDGE TRADER: All right. Proceed.

[49] MR. BETTS:

Q. Officer, can I ask you to turn to the entry immediately after the date of November 27, 1994?

A. Yes, sir.

Q. What's the date of that entry?

A. It is December the 15th, 1994.

Q. And who made that entry?

Appendix E

A. The state chemist, Carol Wilkerson.

Q. What does that indicate?

A. It indicates that on the 15th of December, 1994, that the state chemist, Carol Wilkerson, certified that the same intoxilizer of Rehoboth Beach Police Department, same serial number was tested prior and was working properly and within proper tolerances and at the times which she tested it.

Q. Could you remove that entry for me, please?

MR. BETTS: Your Honor, I ask that this be entered into evidence as State's Exhibit 3.

[50] MR. WILLARD: Your Honor, I'm going to object on the grounds of the Peck decision, Your Honor. It's not within 30 days of the first test and, therefore, it's inadmissible.

JUDGE TRADER: The objection is overruled.

[67] MR. WILLARD: Your Honor, back to my original argument and I don't mean to beat this to death. Your Honor, the state agrees with my position on the 30 day rule. They're not arguing against me. They said that they know the 30 day rule I'm citing is correct but they're saying since it's only one day outside the rule, it's de minimus and [68] therefore you shouldn't consider it.

JUDGE TRADER: The issue's been raised before me a number of times over the years — over about 23 years — and I've always held that the tests had to be done within a — 30 days before or 30 days after the date of the offense.

Now, I'm not sure whether that's what Peck holds or it holds something different. But in any event, Peck is an unreported decision from the bench and I guess it's persuasive authority but it isn't binding authority on any court. And I'm not certain — I have to look at it again. I've seen a transcript of the bench ruling of Judge Steele.

MR. WILLARD: That's all there is, Your Honor. That's all anybody has. We've been using that very successfully many times, Your Honor.

[69] JUDGE TRADER: What's your opinion of the Peck decision, or what's your understanding of this Peck decision?

MR. BETTS: Your Honor, I have to be painfully honest with the court. I have not seen or read the transcript. I am aware of the decision. I am also — my understanding of the decision as Mr. Willard has indicated, that Judge Steele said it requires a 30 day test. My argument on the outset has been that if you count the days, [70] we've got here, at best, 31; at worse 32. That's de minimus and shouldn't have any bearing whatsoever on the court's decision in this case.

JUDGE TRADER: All right. I've indicated that Peck is a bench decision. I think counsel agree on that. It is not binding authority on any court. Whatever the ruling was, I've always held that the calibration test must be performed within a reasonable time of days of the offense. And I've held that 30 days before, 30 days after is a reasonable time. Certainly it seems to me that these calibration tests were performed within a reasonable time of the date of the offense and, therefore, the test should be admitted into evidence over the objection of the defendant on that ground.